STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY KIDIAN HUNTER,

Defendant-Appellant.

UNPUBLISHED
September 11, 2003

No. 236888
Muskegon Circuit Court
LC No. 01-045961-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12 to consecutive sentences of twenty to forty-five years in prison and twenty-one months to thirty years in prison. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to establish that he possessed the cocaine. We disagree.

We review the sufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* This Court should not interfere with the jury's role of determining the weight of the evidence or credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Circumstantial evidence and reasonable inferences that arise therefrom can be satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, it is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *People v Hardiman*, 466 Mich 417, 438; 646 NW2d 158 (2002).

To establish the crime of possession with intent to deliver, a prosecutor must establish beyond a reasonable doubt that: (1) defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was

cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed the charged amount proscribed under the statute. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Defendant argues that the evidence establishes only that he was present in the apartment where the drugs were found. Although possession may be either actual or constructive, *Wolfe*, *supra* at 519-520 and presence, by itself, at a location where drugs are found is insufficient to prove constructive possession, *Id.* at 520, defendant's argument is unpersuasive because the prosecutor presented sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that defendant *actually* possessed the drugs.

Johnny Sherrod testified that he met with Detective Steve Waltz and agreed to set up a drug deal with defendant. Sherrod called defendant and stated that he wanted an "O." Defendant said he would get it the next day, but he needed a calculator (a scale). Sherrod asked defendant if the cocaine was broken down into "cutties" (a quarter ounce). Defendant said he would get a scale from Foster. After detective Waltz told Sherrod that he could provide a scale, Sherrod called defendant back and said he had a scale. Defendant instructed Sherrod to meet at the apartment on Margaret. Before Sherrod went to the apartment, Detective Waltz strip searched him, searched his vehicle, and gave him $400. Sherrod arrived at the apartment first, followed by defendant. After they entered the apartment, defendant went upstairs and retrieved a bag of solid cocaine. Defendant weighed a portion of the cocaine, and gave it to Sherrod in exchange for $400 and a promise to pay $400 more later that night.

Detective Dennis Davis testified that while performing surveillance on 564 Margaret, he saw defendant arrive, exit his vehicle, and wave to Sherrod to follow him down the sidewalk. Detective Davis lost sight when the two entered the apartment. After approximately five minutes, Sherrod returned to his vehicle and left the parking lot. Detective Davis watched defendant exit the apartment and drive away. Later, WEMET entered the apartment to execute a search warrant. Detective Davis took part in the search and found a scale and a large quantity of cocaine. Allen Kemppainen, from the Michigan State Police in the crime laboratory identified an exhibit as cocaine weighing approximately 304 grams. The scale found in the apartment was the one provided by the police. Currency found on defendant matched the currency given to Sherrod to make the drug purchase.

Based on this evidence, a rational trier of fact could find that defendant knowingly possessed 304 grams of cocaine and intended to deliver this substance to someone else. Therefore, reversal is not warranted on this basis.

II. Ineffective Assistance of Counsel

Defendant next argues that defendant was denied effective assistance of counsel both in the trial court and on appeal. We disagree.

Our review of this issue is limited to alleged errors by counsel evident in the existing trial record because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2002).[1]

To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different and the result of the proceedings was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a presumption that a defendant received effective assistance of counsel, and the defendant has a heavy burden of proof to show otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "When ineffective assistance of counsel, based on a failure to raise viable issues, is the justification for excusing procedural default, the movant must establish ineffective assistance of counsel pursuant to the standard set forth in [*Strickland*] or that "'some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995).

A. Defense Counsel

Defendant argues that he was denied effective assistance of counsel because defense counsel failed to raise the defense of entrapment. Although the issue of entrapment is waived if it is not raised prior to sentencing, *People v Crall*, 444 Mich 463, 464; 510 NW2d 182 (1993); *People v James Bailey No 1*, 439 Mich 897; 478 NW2d 480 (1991), we address it because defendant has raised this issue within the context of an ineffective assistance of counsel claim. With regard to entrapment, our Supreme Court recently held:

> Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. [*People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002).]

The defendant must establish by a preponderance of the evidence that he was entrapped. *Id.* at 498.

Based on the lower court record, we find defendant would not have been able to establish by a preponderance of the evidence that he was entrapped. Defendant had previously sold drugs to Sherrod, knew where to obtain a scale, was versed in the lingo of drugs sales, and extended

[1] Defendant filed a motion to remand at the same time he filed his Standard 11 Brief in this Court. The motion and brief were filed approximately one year after the original brief on appeal was filed. This Court denied the motion "for failure to persuade the Court of the necessity of a remand at this time."

Sherrod a $400 credit on the purchase. There was no indication the police officers appealed to defendant's sympathy as a friend, made the commission of the crime unusually attractive, offered excessive consideration, guaranteed that the alleged act was not illegal, exerted extensive pressure, offered sexual favors, made threats or arrest, engaged in procedures intended to escalate the crime, or exerted control over the informant. *Id.* at 498-499. Even though defendant was targeted in the investigation, there is no evidence that the police engaged in reprehensible conduct. The police use of a confidential informant to target a dealer and arrange a drug deal is not in itself considered reprehensible conduct. See *People v Hampton,* 237 Mich App 143, 156-158; 603 NW2d 270 (1999); *People v Nexten,* 160 Mich App 203, 208; 408 NW2d 77 (1987). The fact that Detective Waltz provided a scale also does not support a claim of entrapment. After defendant told Sherrod that he needed a scale and would get one from Foster, Sherrod offered a scale that was in fact provided by the police. Defendant accepted that offer. Thus, defendant willingly participated in the criminal enterprise and the police did nothing more than provide defendant with an opportunity to commit the crime. Because defendant would not have been able to prove entrapment by a preponderance of the evidence, defense counsel was not ineffective for failing to raise the issue in the trial court. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Hawkins,* 245 Mich App 439, 547; 628 NW2d 105 (2001).

B. Appellate Counsel

Defendant also argues that he was denied effective assistance of appellate counsel because appellant counsel failed to move for a remand for a *Ginther*[2] hearing. Defendant has failed to establish that appellate counsel was ineffective under the *Strickland* standard.[3] First, as noted above, defendant was not prejudiced by appellate counsel's failure to move for remand because this Court considered the motion to remand filed by defendant. Further, as discussed above, nothing in the record supports defendant's argument that defense counsel was ineffective for failing to raise the entrapment defense. Because there is no indication that defense counsel was ineffective, defendant was not prejudiced by appellate counsel's alleged failure to file a motion for remand for a *Ginther* hearing to explore this issue further.

III. Prosecutorial Misconduct

Defendant next argues that he was denied a fair trial based on prosecutorial misconduct. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle,* 246 Mich App 282, 288; 632 NW2d 162 (2001). Because defendant failed to object to the questions and arguments that he now challenges on appeal, this issue is not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra* at 763. To avoid forfeiture

[2] *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] Defendant does not argue that an objective factor external to the defense impeded counsel's efforts to comply with a procedural rule.

of an unpreserved claim, the defendant must demonstrate a plain error that was outcome determinative. *Id*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Shutte, supra* at 721.

Where an accomplice or co-conspirator has been granted or has a reasonable expectation of immunity other leniency, it is incumbent upon the prosecutor and trial judge, if the fact is brought out in trial, to disclose the fact to the jury upon request of defense counsel. *People v Atkins,* 397 Mich 163, 173; 243 NW2d 292 (1976). A prosecutor has a constitutional duty to report to the defendant when a witness for the prosecution lies under oath and a duty to correct the false evidence. *People v Lester,* 232 Mich App 262, 271; 591 NW2d 267 (1998). Nevertheless, the mere possibility of future leniency does not have to be disclosed:

> It is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness's credibility. It is quite another to require "disclosure" of future possibilities for the jury's speculation. Indeed, if a prosecutor were required to volunteer that, although there was no agreement, he intended to recommend some sort of consideration for a witness because the witness was testifying in this and other cases or had corrected his past misdeeds, could this not be viewed as vouching for a witness's credibility? The focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony. [*Atkins*, supra at 174.]

"The disclosure requirement may be considered satisfied where the 'jury [is] made well aware' of such facts 'by means of . . . *thorough and probing cross-examination* by defense counsel.'" *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990), quoting *Atkins, supra* at 174 (emphasis in original).

Here, the prosecutor did not mislead the jury or elicit false testimony. There was no evidence in the lower court record that Sherrod was promised leniency or had a reasonable expectation thereof. While there was evidence that leniency generally is possible when a witness testifies for the prosecution, defense counsel probed this matter on cross-examination. The fact that Sherrod ultimately received what defendant describes as a favorable sentence is not part of the lower court record. Even assuming that Sherrod did receive a favorable sentence, the evidence did not demonstrate that Sherrod testified in exchange for the prosecutor's promise of leniency or a reasonable expectation of leniency. Therefore, defendant has failed to show that the prosecutor improperly misled the jury or elicited false testimony from the witnesses. Accordingly, defendant has not avoided forfeiture of this issue by showing plain error.

IV. Sentence

Defendant next argues that he is entitled to the benefit of new legislation eliminating the mandatory minimum sentence of twenty years under MCL 333.7401(2)(a)(ii) which became effective March 1, 2003, after defendant was sentenced and after he filed his appeal. We disagree.

We review issues of statutory interpretation de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). "Generally, a criminal defendant is sentenced according to the statute in force at the time he committed the crime. . . . An amendment to a criminal statute which concerns sentences or punishment is not retroactive." *People v Sinistaj*, 184 Mich App 191, 202; 457 NW2d 36 (1990). Unless the Legislature expressly provides otherwise, a defendant is properly sentenced under the version of the statute in effect at the time he committed the crime. *Id.* at 202-203; *People v Marji*, 180 Mich App 525, 543; 447 NW2d 835 (1989).

Although amendments regarding sentences are generally not retroactive, defendant argues that, according to *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990), his case should be remanded for resentencing because "appellant's direct appeal is pending after the effective date of the amendatory act took effect." Although the *Schultz* ruling is not binding on this Court because it was a plurality decision in which the majority of the justices failed to concur on the exact reasoning for the holding, this Court has applied the decision to remand for resentencing cases involving controlled substance offenses.[4] *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991). *Shultz* addressed an amendment to MCL 333.7401(2)(a)(iii) which, at the time the defendant committed the offense, provided a mandatory ten-year minimum term and a maximum twenty-year term. *Schultz*, at 523-524. One month before the defendant's scheduled sentencing date, 1987 PA 275 took effect amending the statute by reducing the minimum term from ten years to five years. *Id.* at 524. The Court held:

> In light of the Legislature's decision that the current terms of punishment authorized in the Public Health Code constitute an appropriate social response to narcotics crimes and abuse, *we would hold that the Legislature intended cases pending in the trial court and those on direct appeal, where the issue is raised and preserved, on the date the amelioriative amendments took effect to be included within the ambit of the amended Public Health Code.* To conclude otherwise would be inconsistent with the underlying purpose of the general saving statute and the sentencing policies of this state. [*Id.* at 526 (emphasis added).]

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[4] *People v Arnold*, 437 Mich 901; 465 NW2d 560 (1991); *People v Rubante*, 437 Mich 902; 465 NW2d 560 (1991); *People v Manos*, 437 Mich 901; 465 NW2d 559 (1991); *People v Rodriguez*, 437 Mich 902; 465 NW2d 559 (1991); *People v Sparks*, 437 Mich 902; 465 NW2d 282 (1991); *People v Layne*, 437 Mich 927; 462 NW2d 26 (1991); *People v Leighty*, 437 Mich 953; 467 NW2d 591 (1991); *People v Tucker*, 437 Mich 976; 468 NW2d 50 (1991); *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991).

However, even applying this rational, the amended statute should not be applied to defendant's sentence. The new legislation eliminating the mandatory minimum sentence of twenty years under MCL 333.7401(2)(a)(ii) became effective March 1, 2003. Defendant committed the crime in March 2001. He was convicted in August 2001 and sentenced in September 2001. He filed his claim of appeal on September 21, 2001. Therefore, even according to *Schultz*, the amendment should not be applied to defendant's case because it was not "pending in the trial court [or] on direct appeal, where the issue is raised and preserved, on the date the ameliorative amendments took effect." *Id.* at 626.

Defendant argues that appellate counsel was ineffective for failing to raise this issue on appeal. This argument is unpersuasive for several reasons. First, the amendment was not in effect until approximately one and a half years after the appeal was filed. Second, defendant's motion to remand for a *Ginther* hearing on this issue was addressed and denied by this Court. Further, we have addressed this issue which defendant raised in his Standard 11 brief. Third, even by the terms set forth in *Schultz*, the amendment should not be applied to defendant's case. Defendant is not entitled to resentencing nor was he denied effective assistance of appellate counsel.

V. Cumulative Error

Defendant finally argues that he is entitled to a reversal and a new trial and a new appeal based on cumulative errors. We disagree.

With regard to reversal a new trial, the cumulative effect of several minor errors may warrant reversal in some cases even where individual errors would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In order to reverse because of cumulative error, the effect of the errors must be sufficiently prejudicial to warrant a finding that the defendant was deprived of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). Because defendant has failed to show any error occurred in the trial court, there is also no cumulative error requiring reversal.

With regard to a new appeal, defendant claims that he was denied the effective assistance of appellate counsel, and as such, this Court should grant him a new appeal. Indeed, the remedy for a claim of ineffective assistance of appellate counsel is a new appeal**.** However, because this Court has considered each issue raised in defendant's supplemental brief, a new appeal is unnecessary. *People v Brown*, 119 Mich App 656, 660-661; 326 NW2d 834 (1982).

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly